STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA E. KOLLER,

Plaintiff-Appellant,

v

PONTIAC OSTEOPATHIC HOSPITAL, PATRICK LAMBERTI, and DONALD BROCK, D.O.,

Defendants-Appellees,

and

ROBERT ARANOSIAN, D.O.,

Defendant.

UNPUBLISHED
May 21, 2002

No. 229630
Oakland Circuit Court
LC No. 98-010565-CL

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff brought this action, alleging that she was constructively discharged from her employment and asserting claims under the Whistleblowers' Protection Act, MCL 15.361, *et seq*, and for intentional infliction of emotional distress. The trial court granted defendants'[1] motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

I

Plaintiff was employed by defendant, Pontiac Osteopathic Hospital, as an emergency room nurse. Plaintiff alleges she was professionally harassed by defendants Doctors Robert Aranosian and Donald Brock because she objected to instances of patient abuse. Plaintiff further alleges she reported the harassment to the CEO of the hospital but that he failed to take corrective measures. Plaintiff claims the harassment was so severe she was forced to resign.

[1] Defendant Dr. Aranosian is not a party to this appeal. The claims against Dr. Aranosian were stayed due to bankruptcy proceedings.

Plaintiff's first complaint of patient abuse was made April 30, 1997, when she wrote a letter to the Director of Nurses complaining that Dr. Aranosian had insisted on having a catheter inserted in an intoxicated patient where such procedure was not medically necessary. Plaintiff claimed Dr. Aranosian ordered the procedure to teach the patient a lesson. Plaintiff testified this was the only time she observed Dr. Aranosian "abuse" a patient. Plaintiff did not threaten to report this alleged act of patient abuse to anyone outside of the hospital.

On December 11, 1997, plaintiff wrote a letter to the Director of Outpatient Services concerning Dr. Brock's alleged mistreatment of a patient on November 29, 1997, in which Dr. Brock needlessly placed the patient in restraints. Plaintiff alleged the patient was later assaulted by Dr. Brock and security personnel. Plaintiff admitted she did not know whether the patient was suicidal. Plaintiff further admitted she did not witness the alleged physical assault. In her December 11, 1997, correspondence, plaintiff did not threaten to report the incident to anyone outside of the hospital.[2]

Plaintiff alleged that retaliatory harassment by Dr. Aranosian occurred in May 1997, and by Dr. Brock on November 29, 1997. The harassment consisted of complaints about plaintiff's job performance made either directly to plaintiff or to her supervisors. However, plaintiff received a raise on February 1, 1998, and a favorable job performance evaluation on February 16, 1998. Thus, it appears these alleged acts of harassment did not impact plaintiff's ability to perform her job nor her supervisor's perceptions regarding plaintiff's job performance.

On May 14, 1998, plaintiff wrote a letter to the hospital CEO asking for the harassment to stop. Plaintiff listed eight allegations of harassment that had not previously been documented in writing but which could be verified by witnesses. Additionally, plaintiff indicated that since January 9, 1998, she had been documenting her claims of harassment in writing and asking her supervisors to sign her reports.[3]

On May 15, 1998, plaintiff met with the hospital CEO, the Director of Outpatient Services and the Director of Nurses. During this meeting, plaintiff complained about certain doctors who were abusive to patients and staff. Plaintiff also discussed her claims of harassment, which she claimed commenced after she complained about Dr. Brock's and Dr. Aranosian's treatment of patients in 1997. The hospital administration informed plaintiff that an independent investigation would be undertaken by outside counsel. Plaintiff indicated that these problems had to be addressed or she would "have to get some outside agency to help [her]."[4]

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[2] At her deposition, plaintiff testified that Dr. Brock was involved in other incidents of abuse. However, plaintiff had not reported any of these other allegations to anyone.

[3] In generic terms, plaintiff's claims of harassment consisted of additional claims of patient abuse and claims that the doctors involved became angry and began to exclude her from certain types of work or patients. She also claim doctors began reporting her for every real or imagined violation of professional standards. Plaintiff claims the more she complained to her supervisors, the more she was subject to this type of harassment.

[4] Plaintiff testified that she first threatened the CEO with reporting her complaints to someone outside the hospital during a meeting she had with him on August 4, 1998. However, this claim

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On August 4, 1998, plaintiff again met with the CEO to discuss plaintiff's latest claims of harassment and the preliminary report from the independent investigation. The CEO informed plaintiff that as a result of the investigation, an "educational support program" would be put in place to assist the doctors and staff to better work together in the emergency room. Plaintiff responded that she would not allow the problems to be swept under the rug and, if required, she would "go outside of this hospital to a licensing agency to report her allegations of patient abuse."

On or about August 14, 1998, plaintiff reviewed her personnel file. There was nothing negative in it except for verbal warnings for tardiness and absenteeism. On or about August 19, 1998, plaintiff wrote another letter to the CEO stating that she continued to be harassed. Plaintiff stated the failure to stop the harassment was an act of retaliation by the hospital. Plaintiff documented her many threats, commencing as early as June, 1997, to go to an outside agency to report the claims of abuse. Plaintiff ended her letter by stating:

> Due to this . . . harassment, the unacceptable results from your investigation and concern for my health and future employment, I have no other recourse than to take this abuse and harassment situation to the . . . State of Michigan.

On November 6, 1998, plaintiff resigned her position, effective November 30, 1998, "out of necessity, and for [her] physical and psychological well being. . . ." Plaintiff stated she had suffered retaliation and harassment from Drs. Aranosian and Brock "following [her] repeated reports of patient and staff abuse and threats to expose these practices and the hospital to the appropriate state agencies." Further, plaintiff claimed her "job performance ha[d] repeatedly and adversely been affected by interference from" Drs. Aranosian and Brock. Plaintiff further alleged she had "lodged several complaints. . . to various officials of the hospital, [but] [t]he focus of their response ha[d] never been directed appropriately and there ha[d] been no adequate correction of this environment."

This lawsuit was filed on November 16, 1998. The trial court granted summary disposition in favor of defendant. This appeal followed.

II

Plaintiff argues that the trial court erred in dismissing her claim under the Whistleblowers' Protection Act. We disagree.

A trial court's grant of summary disposition is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion under MCR 2.116(C)(10), the court

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is inconsistent with plaintiff's own accounts of her May 15, 1998 meeting with the CEO and other management personnel. Further, plaintiff testified that she informed her nursing supervisor in June 1997, and in January and March 1998, of her intent to report her complaints of abuse and harassment to an outside agency.

must examine the documentary evidence presented by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

To establish a prima facie case under the Whistleblowers' Protection Act, a "plaintiff must show that (1) he was engaged in protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge." *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). The fact that plaintiff resigned does not bar her from bringing whistleblowers' action if she can show that she was constructively discharged. See *Jacobson v Parda Fed Credit Union*, 457 Mich 318, 329; 577 NW2d 881 (1998); *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996).

An employee seeking to show protected activity under the "about to report" provision must "show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body." MCL 15.363(4); see also *Shallal v Catholic Soc Services of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). "[A]n employer is entitled to objective notice of a report or a threat to report by the whistleblower." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). However, whether such notice was given can be proven by circumstantial evidence. See *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 279-280; 608 NW2d 525 (2000).

The act "does not explain what constitutes 'about to' report . . . ." *Shallal, supra*, 455 Mich at 611. "[*Random House*] *Webster's* [*College Dictionary*] defines 'about' as 'on the verge of' when followed by an infinitive, such as 'to leave,' or in this case, 'to report.'" *Shallal, supra*, 455 Mich at 612. The Supreme Court recognized a tension between a Legislative desire to protect preemptively-terminated employees, and the danger that disgruntled employees might try to use the act, unjustifiably, for their own benefit. *Id.* Relying on the clear and convincing standard of proof, the Court concluded that the Legislature had "intentionally reduce[d] employee protection the more removed the employee [wa]s from reporting to a public body." *Shallal, supra*, 455 Mich at 613. See also *Chandler, supra*, 456 Mich at 399.

Applying the principles set forth in *Shallal, supra,* we conclude that plaintiff failed to show that she was engaged in protected activity. Plaintiff needed to show, by clear and convincing evidence, that she was "about to" report a violation of law to a public body at the time of her alleged constructive discharge. Drawing all reasonable inferences in her favor, plaintiff told her nursing supervisors, as early as June 1997, that she was considering reporting instances of patient abuse to the state if the harassment did not stop. Because plaintiff's supervisors were management employees, notice to them was constructive notice to the employer of plaintiff's intent to report. See *Chambers v Trettco, Inc*, 463 Mich 297, 312-313, 318-319; 614 NW2d 910 (2000), on remand 244 Mich App 614; 624 NW2d 543 (2001); *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 627; 637 NW2d 536 (2001). In any event, plaintiff provided the hospital CEO verbal notice of her intent to report in May 1998, and written notice in mid-August 1998, when she included the threat to report in her letter. However, while plaintiff provided the required notice to her employer, she did not resign until at least three months after

her letter to the hospital CEO and about a year and a half after she first made the threat to her supervisors. Thus, as found by the trial court, the proofs here were insufficient to allow a reasonable jury to find that plaintiff had shown, by clear and convincing evidence, that she was on the verge of reporting patient abuse to the state at the time of her alleged constructive discharge.

Further, plaintiff failed to establish causation. Plaintiff alleged that the harassment began in April 1997, after she reported incidents of patient abuse to her superiors. She threatened to report those incidents to the state in June 1997, at the earliest. However, there is no indication that the harassment began, or even increased, after she made the first threats to report. Rather, the harassment, if any, seems to have been caused by her initial complaints to her superiors. By the time she verbally threatened her employer with reporting the situation to the state, the harassment had been ongoing for at least a year. Thus, the proofs were insufficient to allow a reasonable jury to find that plaintiff had shown that a causal relationship existed between her threats to report patient abuse to the state, and the harassment that allegedly forced her to resign.

III

Plaintiff also argues that the trial court erred in dismissing her claim of intentional infliction of emotional distress. We again disagree.

Those courts that have recognized the tort of intentional infliction of emotional distress, required plaintiff to show four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985). The offensive conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Roberts*, *supra*, 422 Mich at 603, quoting Restatement Torts, 2d, § 46, comment d, pp 72-73. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Roberts*, *supra*, 422 Mich at 603, quoting Restatement Torts, 2d, § 46, comment d, pp 72-73. The alleged conduct in this case does not rise to the level of extreme and outrageous conduct to support a claim of intentional infliction of emotional distress. The trial court properly granted defendants' motion for summary disposition of this claim.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra